85-1055

No. 85 - ———

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1985

GRACE S. PYLE, a disabled adult, by CAROLYN STRAUB, Successor Guardian of her Estate,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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EDITOR'S NOTE

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## QUESTIONS PRESENTED FOR REVIEW

I. Did the court below apply improper procedures and standards in interpreting a state probate court decision issued in a related proceeding, by (1) determining the intention of the state court judge by examining only the wording of the court's decree rather than considering the totality of the circumstances surrounding its issuance, and (2) by reversing the district court's decision and ordering entry of judgment rather than remanding the matter for development of a proper factual record?

Ruling below: Yes.

II. Did the court below properly apply principles of trust and will construction to a probate court decree by determining that the meaning of the word "comfort" as used in a 1911 Illinois decision interpreting a trust provision was dispositive in interpreting a probate court order and decree also using the same phrase?

Ruling below: Yes.

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*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is reported as *Pyle v. United States*, 766 F.2d 1141 (7th Cir. 1985). The original opinion of the United States District Court for the Central Division of Illinois, Springfield Division, is reported as *Pyle v. United States*, 581 F. Supp. 252 (C.D. Ill. 1984). The opinion of the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois (the "probate court decision") is unreported and is included in Petitioner's Appendix.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 10, 1985. A timely petition for rehearing was denied on October 4, 1985, and this petition for certiorari was filed within 90 days of that date pursuant to 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves the gift tax provisions of the United States Internal Revenue Code, 26 U.S.C. §§ 2501, *et seq.*, as well as Treasury regulations on gift tax codified as 26 C.F.R. § 25.2511-1, *et seq*. As these provisions are extremely lengthy, the full text of relevant sections has been reproduced in Petitioner's Appendix pursuant to Supreme Court Rule 21(f).

## STATEMENT OF THE CASE

While this petition for certiorari concerns the proper standards and procedures to be applied by a federal appeals court in interpreting a related state court decree, the underlying dispute arose in the field of gift taxation and involves the interpretation of an Illinois probate court decree, which in turn interprets the will of Petitioner Grace Pyle and her deceased husband Homer Pyle. Specifically at issue is the question whether certain interests devised under the provisions of those wills are sufficiently definite in nature to constitute taxable gifts under the Internal Revenue Code and associated regulations.

On November 29, 1973, Petitioner Grace Pyle and her husband Homer executed a document designated as a "joint will," which provided in pertinent part that:

Third. I, Homer V. Pyle, hereby will, give, devise and bequeath all of my property, both personal and real or mixed, and wheresoever situated, to my wife, Grace S. Pyle, in fee simple.

Fourth. I, Grace S. Pyle, hereby will, give, devise and bequeath onto my husband, Homer V. Pyle, all of my property, both personal, real or mixed, and wheresoever situated to be his in fee simple.

The sixth paragraph of the will provided that "after the decease of both of us, or the survivor of us we will, give and bequeath unto the following named persons" certain designated sums of money. Paragraph seven provided that "we and each of us will that the survivor of us dispose the remainder of our estate to the following named parties, corporations, institutions and individuals" (again listing a series of designated beneficiaries). The joint will of Homer and Grace Pyle contains no other dispositive provisions and no trust language.

Homer Pyle died on March 27, 1978. Subsequent to his death, Grace Pyle was adjudicated a disabled person and her Guardian sought construction of the will. Some of the residual beneficiaries requested the Illinois Circuit Court of the Seventh Judicial Circuit to declare that a valid joint will had been created and that therefore they had a vested remainder interest in the residue of the estate. It may be assumed that the beneficiaries were motivated by the ambiguity created by use of the phrase "fee simple" in the dispositive provisions of the document designated a "joint will." If the "fee simple" language had been held to supersede the "joint will" designations, Grace Pyle would have been free to change her will at any time, thus eliminating

the residual beneficiaries from the joint testamentary scheme. All parties agree that Illinois law is controlling with regard to this issue.

On June 10, 1981, the Illinois probate court construed the will as a joint and mutual will. In so doing, the court characterized the will using the following language, the interpretation of which lies at the heart of this dispute:

> Grace S. Pyle has fee simple title to any and all property standing in the sole name of Homer V. Pyle at the time of his death subject to the contract contained in the joint and mutual will. Said contract restricts Grace S. Pyle from alienating, transferring, conveying or disposing of any and all of her property howsoever acquired with the exception that she or her legal representatives may utilize the income and any corpus necessary for her health, support, comfort and maintenance requirements.

Explanation of the latent ambiguity contained in this paragraph, its importance, and its relevance to this petition requires a brief review of federal gift tax legislation, an issue that is not in dispute.

The scope of federal gift taxation is extremely broad, and vested remainder interests created by a trust or will are clearly gifts as defined by the Internal Revenue Code. Liability for payment of the gift tax, however, does not arise until the gift is complete. For tax purposes, such a gift is considered complete when the "donor has so parted with dominion and control as to leave him no power to change its disposition, whether for his own benefit or for the benefit of another." The donor of a gift is not considered to have retained this power to change disposition if his or her power over the property conveyed is limited by a

"fixed or ascertainable standard." Treasury regulations on gift tax, § 25.2511-2(b).

On December 27, 1978, Grace S. Pyle filed a federal gift tax return and eventually paid gift tax and interest in the amount of $315,298. Subsequent to the Illinois probate order, however, a claim for refund was filed by her Guardian on the ground that the return had been "erroneously filed and taxes paid in error." It is the position of Petitioner Pyle that the joint will as interpreted by the probate court allows her to use the transferred assets for any legitimate or reasonable purpose; the only restrictions imposed by the joint will are a prohibition against waste and against inter vivos transfers for less than full consideration, which would serve to defeat the contract contained in the joint and mutual will. If this characterization of the document is upheld, all parties concede that no gift tax is due.

The government, however, claims and the appeals court held that the language contained in the probate court order allowing Grace Pyle to utilize the devised assets only for "her health, support, comfort and maintenance requirements" constitutes language of limitation that is sufficiently ascertainable under Illinois law to render the gift complete. Under this view, petitioner would be limited to maintaining her present station in life, and the remaindermen would retain the power to enjoin excessive expenditures. It is conceded that if the government's position is upheld with regard to the construction of the will, its position with regard to the tax consequences also follows.

The district court, in an opinion issued by Judge Waldo Ackerman, resolved the controversy by observing that:

> The focal point of this case is Grace Pyle's power to invade the corpus for her health, support, comfort

> and maintenance. If this power renders the gift of the remainder incomplete, the gift tax was inappropriate. A retained power renders a gift incomplete when it is not limited or ascertainable.

581 F. Supp. at 253. In ruling against the government, Judge Ackerman determined that under state law the language used by the probate court did not create an ascertainable standard, holding:

> Grace Pyle had the right to invade corpus for her health, support, maintenance and comfort. Only Grace Pyle could determine what was necessary for her comfort. There is no indication in any of the documents filed in this court that Grace Pyle had to exhaust specific assets before she could invade the corpus for her comfort and support. . . . As long as Grace Pyle determined the assets were necessary to her comfort she could use them. Obviously this could consume the corpus in its entirety.

*Id.*

The Seventh Circuit Court of Appeals based its reversal of the district court's decision on three grounds. First, the court observed that the Illinois probate court had "imposed significant constraints on [Grace's] liberty to dispose of the property . . . so that an ascertainable standard indeed limits her interest." 766 F.2d at 144.

Second, the appeals court relied on a 1933 Illinois Supreme Court decision, *Rock Island Bank & Trust Company v. Rhoads,* 353 Ill. 131, 187 N.E. 139 (1933), which held that the phrase "comfort and satisfaction" did not create ascertainable limits on the life tenant's ability to invade the corpus. In *dicta,* however, the 1933 decision states that the word "comfort" standing alone "would be a limitation

on her power of disposal to such of the corpus as she should determine necessary to maintain her station in life to which she was accustomed" leading the appeals court to conclude that "comfort" has a fixed meaning under Illinois law. 766 F.2d at 1145. Finally, the appeals court purports to distinguish a number of similar cases relied on at the district court level, on the theory that the court's interpretation in each case had found a power to invade the estate corpus—in essence, the appeals court begs the question; the cases are distinguished not on the basis of their facts, but on the basis of their outcome.

It is axiomatic that, while a petition for certiorari is not filed absent a belief on the part of the petitioner that an erroneous result had been reached, arguments as to the correctness of the Seventh Circuit's decision itself are not sufficient to support this Court's exercise of its discretionary jurisdiction. What gives petitioner cause for concern, however, is the methodology used by the Seventh Circuit in interpreting the Illinois probate court decree. The context of the probate court hearing, and the intent behind the will itself were ignored by the appeals court, and an unjust result was reached thereby. It is on this basis that petitioner respectfully requests this Court to exercise its discretionary powers of review.

## REASONS FOR GRANTING THE WRIT

### I.

### IN INTERPRETING A STATE COURT DECREE, THE FEDERAL COURT OF APPEALS IS REQUIRED TO CONSIDER THE CONTEXT, INTENT AND PURPOSE OF THE DECREE RATHER THAN MERELY THE WORDING OF THE DOCUMENT; IN THE EVENT OF UNCERTAINTY OR DISAGREEMENT WITH THE LOWER COURT'S CONCLUSIONS, THE MATTER SHOULD BE REMANDED FOR DEVELOPMENT OF A MORE COMPLETE RECORD.

Both Homer and Grace Pyle, in their joint and mutual will, bequeathed their property to each other in "fee simple", a phrase also used by the probate court. Yet the Seventh Circuit court's opinion relies most heavily on the legal meaning of the word "comfort", a word that appears nowhere in the will. It is the process by which this result was achieved, rather than the result itself, that petitioner believes merits this Court's review. Specifically, it is petitioner's claim that improper methodology and standards were used in interpreting the Illinois probate court's decree.

In essence, the appeals court treats the Illinois probate court's decision as if it were the will, rather than merely an interpretation of the will rendered for certain limited purposes in an unrelated dispute. The appeals court takes the probate court's phrase "health, support, comfort and maintenance," and dissects it on a word-by-word basis, considering only the content of the decree rather than its context. This is clearly the correct methodology to be used in interpreting a will or similar document; in most jurisdictions, parol or extraneous evidence may be introduced only to settle ambiguities not resolvable from the face of the docu-

ment. A court decree, however, requires a different standard of evaluation.

### A. In Interpreting a State Court Decree, the Federal Court of Appeals is Required to Consider Not Only the Language of the Decree, but Its Purpose in the Context in Which It Was Issued.

There is very little law that expressly addresses the proper methodology for interpreting a state court decree in federal court, a stiuation that suggests that this Court's discretionary authority should be invoked in the instant case. All cases that have considered the issue, however, hold that any ambiguity in a court decree is to be resolved not solely from the face of the document but by an examination of the context in which the decree was issued. As the Sixth Circuit Court of Appeals noted in *NLRB v. Budd Manufacturing*, 169 F.2d 571 (6th Cir. 1948), *cert. denied*, 355 U.S. 908 (1949):

> The proper construction of a court's decree is not to be obtained by seizing upon isolated parts of the decree; rather it is to be determined by an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish. Its scope is to be determined by what preceded it, and what it was intended to execute.

169 F.2d at 574; *accord, Norfolk and Western Railway Company v. Board of Education, Chicago*, 114 F.2d 859 (7th Cir. 1940). The same language is also found in numerous Illinois cases, going back perhaps to the progenitor case, *People v. La Mothe*, 331 Ill. 351, 163 N.E. 6 (1928), where the court observed:

> The construction to be placed upon these decrees must be made with reference to the issues which they were intended to determine. If their language is broader than is justified, it will be limited by construction, so that its effect shall be only as needed for the purposes of the case which has been made and the issues which have been decided.

163 N.E. at 8. *Accord, Comet Casualty Company v. Schneider,* 98 Ill. App. 3d 786, 424 N.E.2d 911 (1981); *Midland Electric v. Knox County,* 1 Ill. 2d 200, 115 N.E. 2d 275 (1953).

As an examination of the Seventh Circuit's opinion in this case reveals, no attempt was made to examine anything other than the literal wording of the probate court's decree. Indeed, such an interpretation would present factual questions not answerable on the basis of the record before the appeals court. Yet, after having ruled against petitioner's claim that the phrase "fee simple" was determinative, the court proceeded to enter judgment, rather than remanding the matter to the district court for further proceedings. The problem resulting from such an approach is one likely to occur in the future and is hence a subject suitable for this Court's discretionary review.

### B. An Analysis of the Illinois Probate Court's Decision Taken in the Context in Which It Was Issued Demonstrates Clearly that the Court of Appeals' Methodology Was Faulty.

In applying to a court decree principles of interpretation normally reserved for wills and similar documents, the Seventh Circuit assumes that the probate court was presented with and ruled on the identical question. An analy-

sis of the record shows that this assumption is faulty, and demonstrates the need for this Court's guidance in future cases involving collateral court decrees.

As has been discussed, the Illinois probate decision arose out of an action commenced by residual beneficiaries under the joint will; presumably, those beneficiaries were concerned about the ambiguity created by the use of the words "fee simple" and "joint and mutual will" in the same document. It cannot be gainsaid that the document is ambiguous in this respect, and that a judicial construction was required. Under Illinois law, designation of a document as a "joint will" carries with it the presumption that the document was executed to provide remaindermen with a vested interest such that the document cannot be altered after the death of either of the parties to it. By contrast, use of the phrase "fee simple" implies an absolute right in the survivor to use the corpus of the estate for any purpose, thus potentially divesting any remainder beneficiaries. It was therefore necessary for the probate court to determine, where the use of absolute language granting a fee interest was followed by gift over language to third parties, whether the testator intended such language to be controlling or merely precatory or advisory in nature. *Compare Carrico v. Barker*, 408 Ill. 182, 96 N.E.2d 544 (1951) (merely precatory language), *with Tolman v. Reeve*, 393 Ill. 272, 65 N.E.2d 815 (1946) (subsequent language intended to limit the fee).

The Illinois probate court ruled that the document created a joint will and gave the third party beneficiaries an interest in the litigation under the Illinois Probate Act. During the hearing, the probate court indicated that Grace Pyle had the right to consume the entire corpus of the

estate if necessary, but never attempted to analyze or define the exact scope of her power of invasion.

The probate court, limiting the issues under consideration before it, held:

> The question raised by the cross-motions for summary judgment is whether the instrument designated as last will and testament and executed by Homer V. Pyle and Grace S. Pyle on November 29, 1973 constitutes a joint and mutual will or two separate wills standing apart but executed on the same instrument.

Probate Court Findings of Fact, ¶ 6. As might be expected under the circumstances, the court's order specifically notes that "other issues raised in the pleadings filed in this cause by all parties are reserved for further hearing and determination by this court." Probate Court Order at 6. Subsequently, the probate court found that Grace Pyle could completely exhaust the estate if necessary, observing that "she's entitled to it . . . the charities . . . may . . .or may not receive part." (Respondent's Appellate Court Appendix, A. 53-54).

Given this context, the flaw in the appellate court's opinion and the need for this Court to provide guidance in future similar cases is clear. Without examination of the context, the appeals court proceeds to reach a number of assumptions that are not supported by the record, were never briefed, and have not received full consideration. For example, the appeals court relies heavily on language in the probate court order dealing with transfer of assets and other restrictions to conclude, incorrectly, that the probate court intended to limit Grace Pyle's ability to invade the corpus of the estate, ignoring her right to use all available funds if necessary. Grace Pyle is currently dis-

abled and subject to a guardianship order with Carolyn Straub as her guardian; the court's comments were intended to respond to concerns expressed by the guardian as to her proper course of action in future dealings with the estate.

At the district court level, petitioner argued that the probate court's use of the phrase "fee simple" indicated a clear intent by both the testator and the probate court to allow invasion of the corpus of the estate. The district court held that the probate court language, taken in its entirety, did not sufficiently limit that power of invasion so as to create gift tax consequences.

The court of appeals seems to assume that, by using the phrase "health, support, comfort and maintenance," the probate court intended language of limitation, and merely inquired whether the limitation was "ascertainable." When the context of the probate decree is considered, however, it appears that the probate court intended merely to describe the effect of the will under Illinois law, and did not intend its own language to be dissected on a word-by-word basis to interpret the will.

Cause, therefore, exists for this Court to exercise its discretion to determine the proper analysis to be used in interpreting such court decisions and to provide guidance to federal courts confronted with similar problems in the future.

## II.

## THE SEVENTH CIRCUIT COURT OF APPEALS IMPROPERLY APPLIED PRINCIPLES OF TRUST AND WILL CONSTRUCTION TO THE PROBATE COURT DECREE BY DETERMINING THAT THE MEANING OF THE WORD "COMFORT" WAS DISPOSITIVE IN INTERPRETING THE PROBATE COURT'S ORDER.

While petitioner acknowledges that a federal court's improper interpretation of state law, standing alone, does not provide sufficient basis for a grant of certiorari, it is nevertheless true that such an erroneous interpretation is one factor to be considered in granting that discretion. More importantly, as the primary concern in this petition for certiorari is the method used by the federal court to reach its conclusion rather than the conclusion itself, some review of state law is unquestionably relevant. This consideration becomes particularly important where the construction of state law accepted by the district court is totally opposite that mandated by the federal gift tax regulations themselves.

In this case, the will itself uses the phrase "in fee simple" The Illinois probate court decision uses both the phrase "fee simple" and the phrase "health, support, comfort and maintenance". The court of appeals decision finally comes full circle, resting only on the interpretation of the word "comfort" without considering the remaining language. Yet in Illinois, as well as in a majority of jurisdictions, a joint will that decrees property absolutely or "in fee simple" creates a right in the survivor to invade the corpus of the trust upon discretion subject only to the general requirements of good faith and that the underlying joint will not

be revoked and the contract it contains be honored. Indeed, the probate court recognized that Grace Pyle might well consume the entire estate, and that the remaindermen might take nothing. Under such circumstances, there is no gift tax. *Suwalski v. Suwalski*, 112 Ill. App. 2d 98, 251 N.E.2d 279 (1969) ("joint will" leaving property to the survivor "for his or her own use and benefit forever" creates a right of invasion of the corpus), *accord, Lidbury, Estate of*, 84 T.C. No. 10 (1985) (as to third parties such a will is contractual, and not dispositive in nature), *see also Newman v. United States*, 176 F. Supp. 364 (S.D. Ill. 1959), (federal estate tax). *Cf. Keiser v. Jensen*, 373 Ill. 184, 25 N.E.2d 819 (1940); *Teel v. Mills*, 117 Ill. App. 97 (1904).

The principle embodied in these Illinois cases reflects the law in a large majority of jurisdictions. As the Wisconsin Supreme Court observed in *Estate of Jacobs*, 284 N.W. 2d 638 (Wis. 1979):

> We agree with the majority of courts which have held that where a joint contractual will leaves the property to the survivor in fee simple or otherwise unrestricted, giving whatever might remain at the survivor's death to others, the survivor is allowed to make any good faith inter vivos disposition desired.

284 N.W.2d at 641. *See also Ohms v. Church of the Nazarene*, 130 P.2d 679 (Idaho 1942); *McCuen v. Hartsock*, 159 N.W.2d 455 (Iowa 1968); *Lindley v. Lindley*, 356 P. 2d 455 (N.M. 1960); *Watson v. Watson*, 576 S.W.2d 467 (Tex. Civ. App. 1978); *cf. Ammons v. Williams*, 212 S.E. 2d 769 (Ga. 1975).

Similarly, both the appeals court decision and the appellant's brief recognize that federal treasury regulations do not generally treat words such as "comfort, welfare or

happiness" as creating ascertainable standards. 766 F.2d at 1145, citing 26 C.F.R. § 20.2041-(1)(c)(2).

The district court generally followed the rationale followed by the treasury regulations, concluding that from a "purely grammatical standpoint," it can be assumed that the addition of the word "comfort" to the more traditional terms "health, support and maintenance" was intended to expand rather than to limit the life tenant's ability to invade the corpus.

In rejecting the district court's reasoning, the appeals court argued that the word "comfort" has an ascertainable meaning under Illinois law contrary to that used by the treasury regulations. In so doing, however, the appeals court relied solely on a single sentence of *dicta* contained in a 1933 Illinois Supreme Court decision, *Rock Island Bank & Trust Company v. Rhoads*, 353 Ill. 131, 187 N.E. 139 (1933). Since both the court of appeals and the district court relied on the *Rhoads* decision to support the contrary conclusions the two courts reached, the case is worth examining in detail.

The testator in *Rhoads* left a life estate in his separate property to his wife with "full authority to use and dispose of so much of the same as may in her judgment be necessary for her comfort and satisfaction in life." 187 N.E. at 141. The Illinois Supreme Court found that this language created unlimited discretion on the part of the wife to invade the corpus. The court went on, however, to observe that it would have reached an opposite result had the word "comfort" alone been used. It is this 51-year-old *dictum* that the appeals court holds to be authority for the proposition that the word "comfort" creates an ascertainable standard.

The probate decree in this case does not use the word "comfort" standing alone; the phrase "health, support, comfort and maintenance," coupled with the phrase "fee simple," obviously reflects an expansive intent. More important, however, a full reading of the *Rhoads* case demonstrates that the Illinois Supreme Court did not take the word "comfort" out of context and hold that it had a fixed or absolute meaning; rather, the court simply attempted to interpret the dispositional scheme of the testator in the context of the will presented to it. In language equally applicable to the appeals court decision in this case, the *Rhoads* court observed:

> It is generally recognized that, by reason of the variety in language used in wills, decisions construing them, while frequently helpful, are yet not controlling, and are less helpful as guides than are the cases on other subjects. . . .
>
> Numerous cases are cited by the parties seeking to sustain their contentions differing from the conclusions reached by this court, but examination of them discloses that they do not require or persuade an agreement with such contentions. It would unduly lengthen this opinion to analyze them here, for, as stated, the construction of a will must depend primarily on the language used by the testator.

187 N.E. at 143, 145.

The thrust of the appeals court's decision is an attempt to find meaning solely in the use of the word "comfort," holding that Illinois law gives the phrase an immutable meaning that must be respected. Illinois law, however, contemplates no such conclusion. If anything, use of the phrase "fee simple" may be considered a term of art indicating

that ascertainable limits on invasion of the corpus of the estate are not intended.

## CONCLUSION

This petition presents the Court with a question of methodology; the method used by the appeals court to interpret the probate court decree does not reflect applicable law or accepted principles of evaluation. Given that these questions are of general application, and little guidance on the issue exists, it is respectfully requested that this Court grant certiorari.

December 24, 1985.

Respectfully submitted,

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# APPENDIX

# APPENDIX A

---

Grace S. PYLE, a disabled adult, by
Carolyn STRAUB, Successor
Guardian of her Estate, Plaintiff-Appellee,

v.

UNITED STATES of America,
Defendant-Appellant.

No. 84-2242.

United States Court of Appeals,
Seventh Circuit.

Argued April 12, 1985.

Decided July 10, 1985.

Taxpayer brought action seeking refund of gift taxes. The United States District Court for the Central District of Illinois, J. Waldo Ackerman, Chief Judge, 581 F.Supp. 252, entered summary judgment in favor of taxpayer, and the Government appealed. The Court of Appeals, Cummings, Chief Judge, held that imposition of gift tax on widow who had executed joint and mutual will with her husband was proper upon husband's death, inasmuch as beneficiaries' interests in property under will was sufficiently certain upon death of husband to constitute completed gift.

Reversed.

1. Wills

Under Illinois law, joint and mutual will gives survivor equivalent of life estate in couple's assets.

2. Wills

Under Illinois law, contract not to revoke that is held to underlie joint and mutual wills renders them irrevocable, such that beneficiaries of joint and mutual will can sue beneficiaries under any subsequent will for specific performance of mutual will's provisions.

3. Wills

Under Illinois law, fact that joint and mutual will states that one spouse's property would pass to other "in fee simple" is not determinative when followed by subsequent clauses that confer property on another at death of other spouse; in such situation, will creates no more than life estate in favor of other spouse.

4. Internal Revenue

Imposition of gift tax on estate of widow who had executed joint and mutual will with her husband was proper upon husband's death, even though widow was still alive; will permitted wife to invade corpus only to meet her requirements for her health, support, comfort, and maintenance, which power was ascertainable under Illinois law, and thus, beneficiaries' interest in property was sufficiently certain upon death of husband to constitute completed gift from widow to remaindermen at time of husband's death.

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R.E. Dehen, Springfield, Ill., for plaintiff-appellee.

Patricia A. Willing, Asst. Atty. Gen., Tax Div., Dept. of Justice, Washington, D.C., for defendant-appellant.

Before CUMMINGS, Chief Judge, and POSNER and FLAUM, Circuit Judges.

CUMMINGS, Chief Judge.

Grace S. Pyle, through her successor guardian, Carolyn Straub, brought suit to recover federal gift tax in the amount of $315,298.00, plus interest and costs. The court below granted Pyle's summary judgment motion. 581 F. Supp. 252 (C.D.Ill. 1984). We reverse.

I

On November 29, 1973, taxpayer and her husband executed a joint and mutual will containing the following two clauses:

> Third: I, Homer V. Pyle, hereby will, give, devise and bequeath all of my property, both personal and real or mixed, and wheresoever situated, to my wife, Grace S. Pyle, in fee simple.
>
> Fourth: I, Grace S. Pyle, hereby will, give, devise and bequeath unto my husband, Homer V. Pyle, all of my property, both personal, real or mixed, and wheresoever situated, to be his in fee simple.

Subsequent paragraphs specified in great detail the disposition that the couple desired of their property at the death of the survivor of them.

Homer died on March 27, 1978. In December of that year, while Grace was hospitalized,[1] her attorney filed a gift tax return and eventually paid taxes and interest of $315,298.00 on all of Grace's property. Evidently he assumed that the couple's will functioned to make a valid

[1]Grace was born March 13, 1897, and is now 88 years old. She evidently has been senile for a number of years, predating her husband's death. See App. 4.

gift from Grace to the named beneficiaries. Grace now challenges this payment as erroneous and seeks a refund.

[1, 2] Grace, along with other parties, filed suit in state court for judicial construction of her and her husband's will. On January 10, 1981, the Illinois Circuit Court of the Seventh Judicial Circuit rendered its opinion. The court construed the will as a joint and mutual will. Illinois courts interpret such arrangements to give the survivor the equivalent of a life estate in the couple's assets. See, *e.g.*, *First United Presbyterian Church v. Christenson*, 64 Ill. 2d 491, 1 Ill.Dec. 344, 356 N.E.2d 532 (1976). The contract not to revoke that is held to underlie mutual wills renders them irrevocable, by which statement courts mean that the beneficiaries of the joint and mutual will can sue beneficiaries under any subsequent will for specific performance of the mutual will's provisions. *Tontz v. Heath*, 20 Ill.2d 286, 292-294, 170 N.E.2d 153 (1960); *Freese v. Freese*, 49 Ill.App.3d 1041, 1043-1044, 7 Ill.Dec. 692, 364 N.E.2d 983 (4th Dist.1977).[3] The court found in the will that Grace and Homer intended "to provide for the needs of the surviving spouse, whomever it might have been, for his or her lifetime, but upon the death of the survivor, a specified plan of disposition was established" App. 31. In order to effect this specified plan, the state court determined that Grace was bound not only to convey whatever happened to remain at her death according to the joint and mutual will's provisions but also to conserve

[3]A testator could still execute a later will that a probate court could admit to probate under the new summary procedures effective in Illinois, but that new will would be subject to later attack on the ground that a previous joint and mutual will that became irrevocable due to the first party's decease barred the later will from having any effect. See *In re Estate of Gaglione*, 97 Ill.2d 408, 73 Ill.Dec. 567, 454 N.E. 2d 664 (1983).

the corpus of the property. Consequently, the court prohibited her "from alienating all of the property and disposing of the same without restriction except insofar as it is necessary to utilize any or all of the assets for her health, support, comfort or maintenance." *Id.* The court then held that Grace

> has fee simple title to any and all property standing in the sole name of Homer V. Pyle at the time of his death subject to the contract contained in the Joint and Mutual Will. Said contract restricts Grace S. Pyle from alienating, transferring, conveying or disposing of any and all of her property howsoever acquired with the exception that she or her legal representatives may utilize the income and any corpus necessary for her health, support, comfort and maintenance requirements.

*Id.* Finally, the court authorized Grace or her legal representatives to sell any of the assets "for investments of equal or more value," with the exception of two parcels of real estate that had been specifically devised. *Id.*

The district court accepted the government's position that the will effected a gift from Grace of her and her husband's entire property to the will's named beneficiaries. But because the district court interpreted the state court's opinion, especially its references to Grace's ability to invade the corpus for her comfort, to mean that her power to invade was not limited by an ascertainable standard, it determined that her gift to the remaindermen was incomplete and therefore not subject to federal gift tax. According to the lower court, the federal government would have to wait until Grace's death and then impose estate tax on the property. We disagree.

II

The issue to be decided is whether the beneficiaries' interests in Homer's and Grace's property was sufficiently certain upon his death to constitute a completed gift from Grace to the remaindermen at the time of Homer's death. The certainty of the gift (and the concomitant ability to value it for taxation purposes) depends on whether Grace's powers to dispose of the property were unlimited or constrained by some ascertainable standard. Illinois law determines the latter question. *Morgan v. Commissioner*, 309 U.S. 78, 80, 60 S.Ct. 424, 425, 84 L.Ed. 1035 (1940) (powers of appointment); *Brantingham v. United States*, 631 F.2d 542, 545 (7th Cir.1980) (same).

[3] The will stated that Homer's property would pass to Grace "in fee simple," but this language is only the beginning of the inquiry. The emphasis plaintiff places thereon is misguided. The Illinois Supreme Court has made clear on previous occasions that general words such as "in fee simple" are not determinative when followed by subsequent clauses that confer the property on another at the death of the first taker. In such a situation, the instrument in question creates no more than a life estate in favor of the first person named *First United Presbyterian Church v. Christenson*, 64 Ill.2d at 498-499, 1 Ill.Dec. 344, 356 N.E.2d 532 (joint and mutual will); *Griffin v. Griffin*, 29 Ill.2d 354, 357-358, 194 N.E.2d 641 (1963) (successive life estates in will). Of critical importance is that the testators' intent "be determined from a reading of the entire will and not from a single word, phrase or section." *First United Presbyterian Church v. Christenson*, 64 Ill.2d at 498, 1 Ill.Dec. 344, 356 N.E.2d 532.

[4] In the case at bar we are fortunate to have the guidance of an Illinois state court's interpretation of the will at issue. The court did not specifically address the question before us, but a close reading of the entire opinion indicates the correct result. Although the court, as had the will itself, described Grace's interest as being held in fee simple, the court imposed significant constraints on her liberty to dispose of the property. While entitled to the income from the property, she may invade the corpus only for her "health, support, comfort and maintenance." The court permitted her to sell some of the assets, but only in order to acquire "investments of equal or more value." Even then certain parcels of real estate may not be disposed of at all unless Grace has consumed all of the other assets first and requires the proceeds of the real estate for her health, support, comfort and maintenance. Although Grace has in fact sold, mortgaged, and used some of the property at issue, she has done so only with the court's approval. While her requesting permission in and of itself is not dispositive, the state court's recognition of the limits imposed by her contractual obligation not to revoke illustrates the extent to which her ability to alienate the property is constrained. These stringent limits reinforce the inference that Grace may not freely dissipate the property so that an ascertainable standard indeed limits her interest.

Unfortunately, other than the judicial construction of the will by the state court, little case law on the issue exists. Plaintiff argues first that the joint and mutual will, as far as its beneficiaries are concerned, was contractual and not dispositive. While they might have a right as third-party beneficiaries to enforce the underlying contract not to revoke, their interest is still both undeterminable and unvested until Grace's death, at which time the right to the

property will vest in them. In support of this argument plaintiff cites *Estate of Lidbury*, 84 T.C. 146 No. 10 (1985), purporting to apply Illinois law. In *Lidbury*, the Tax Court held that a joint and mutual will did not effect a gift from the widower to the will's beneficiaries at the wife's death and would not do so until the husband died.

The *Lidbury* decision is not probative for several reasons. To begin, the Tax Court's characterization of the will as being joint and mutual was in error. The will was joint, because it was a single document acting as the will for two different people, and it contained reciprocal provisions. But it was not mutual in the legal sense of the word, because the couple had not executed the will pursuant to a contract not to revoke. *Id.* at 155. The contract not to revoke underlying joint and mutual wills is the feature rendering them irrevocable and conferring on the beneficiaries thereunder their right to specific performance. In addition, the will in *Lidbury* had not even been admitted to probate when Mrs. Lidbury had died, so that it was not effective as a will. *Id.* at 154. Consequently it was not effective as either a will or as a contract to dispose of the property. In the instant situation the will was admitted to probate at Homer's death. The state court specifically found that it had been executed pursuant to a contract between Homer and Grace. Consequently, it was effective both as Homer's will and as a contract to dispose of the property, and the terms of the contract are not such that Grace is afforded unlimited discretion over the property.[3]

[3]Of course the document will not become effective as Grace's will until she dies. The point is that the will, as Homer's will, purports to dispose of all the property of the couple. See *infra* pp. 1146-1147. The will directs Grace not only to distribute whatever is left in a certain way but also to restrict her use of the property so as to convey the bulk to the named beneficiaries.

The Tax Court in *Lidbury* did state in dicta that even if "the will was [sic] an irrevocable contract upon Mrs. Lidbury's death, it would not result in the transfer of a present interest in the property of the survivor. The effect is contractual, not dispositive." *Id.* at 155. As noted, the will in that case still had not been admitted to probate, so that it could not have been dispositive, unlike the case at bar. Furthermore, the *Lidbury* court cited as support *S.E. Brown v. Commissioner*, 52 T.C. 50 (1969). Yet that case involved a completely different will. First, the survivor retained the right to dispose of his property as he wished, being limited contractually only in his disposition of the property that had been his wife's. *Id.* at 66. Grace, on the other hand, is limited in her disposal of both her husband's and her own property. Second, the court interpreted the will to mean that the survivor was required to give to the beneficiaries of the joint and mutual will only whatever happened to remain at his death; no obligation to make a present transfer of a remainder interest existed. *Id.* at 65. Grace's responsibilities vis-a-vis the property are broader; she must conserve the property for the beneficiaries in order to fulfill the terms of the contract binding her.

Plaintiff next argues that Grace's discretion to dispose of the property was not limited by an ascertainable standard so that imposition of the gift tax was in error. The district court placed great reliance on the Illinois Supreme Court opinion of *Rock Island Bank & Trust Co. v. Rhoads*, 353 Ill. 131, 187 N.E. 139 (1933). The court there held that the phrase "comfort and satisfaction" gave the widow a life estate with an unlimited power of disposal. The court so held, however, only because the word "satisfaction" conferred unlimited discretion on the widow. *Id.*

at 141-142, 187 N.E. 139. The court declared that "[h]ad this clause provided only for her comfort, it cannot be doubted that such would be a limitation on her power of disposal to such of the corpus as she should determine necessary to maintain her in the station of life to which she was accustomed." *Id.* at 142, 187 N.E. 139. Consequently the district court's reference to this opinion to establish that Grace also had an unlimited power of disposal over the property is greatly misplaced. Not only did the will itself not use the word "comfort," that language appearing only in the state court interpretation of the will, but the Illinois Supreme Court itself indicated that the word "comfort" would indeed create an ascertainable standard. As long as Grace's discretion is limited in some definable way—and according to the state court's interpretation of the will her power is so limited—then it can be measured. Once measured, it is subtracted from the total value of the property and tax is imposed only on the remainder. In fact, the gift tax return indicates that Grace's lawyer did in fact account for her interest in this way. App. 17.

Plaintiff's argument also focuses on the word "comfort" in the state court opinion, but discounts the probative value of the *Rock Island* decision. Plaintiff refers instead to federal tax regulations indicating that "comfort" may not be an ascertainable standard See 26 C.F.R. §. 25.2511-1(g)(2) (1984) (gift tax) ("a power to distribute corpus for the pleasure, desire, or happiness of a beneficiary" is not an ascertainable standard); *id.* at § 20.2041-1(c)(2) (powers of appointment) ("power to use the property for the comfort, welfare, or happiness of the holder of the power" is not an ascertainable standard). But the regulations speak in general terms only, and the guiding factor in

determining whether Grace is limited by an ascertainable standard is Illinois law. As *Rock Island Bank & Trust Co. v. Rhoads, supra,* illustrates, "comfort" is indeed an ascertainable standard under Illinois law. It refers to maintaining someone in the station of life to which that person is accustomed. Since Grace's station in life is known, the standard is measurable and hence ascertainable. Moreover, the gift tax regulations, which of course are the most relevant of those plaintiff cites, reiterate that "[t]he entire context of a provision of [an instrument] granting a power must be considered in determining whether the power is limited by a reasonably definite standard." *Id.* at § 25.-2511-1(g)(2). The state court's linking the word "comfort" to the words "health, support, and maintenance" in its construction of the will, while imposing strict limits on Grace's power to alienate her property, convinces us that the will limited her discretion by an ascertainable standard.[4]

Other case law relied upon by plaintiff or by the district court is not persuasive. Cases considering whether the surviving party to a joint and mutual will takes through the will, so that inheritance tax is owed, or under the contract supporting the will, so that the inheritance tax is inapplicable, and deciding that the former is the case, are inapposite. *In re Estate of Murphy,* 38 Ill.2d 76, 78-79, 230 N.E.2d 266 (1967). Cf. *In re Estate of Alter,* 49 Ill.2d 386, 388-389, 275 N.E.2d 364 (1971) (inheritance tax

[4]If Grace's attorney firmly believed that the trial court had interpreted the will to allow Grace an unlimited power to dispose of the property, as he now argues, then counsel would have been better advised to seek clarification on the point from the Illinois court before filing for a tax refund. The ambiguity created by the strict guidelines the Illinois court imposed on Grace's power to alienate the property can be resolved only by concluding that the state court did not interpret the will as broadly as plaintiff now contends.

imposed on property that nursing home owner received through will executed pursuant to contract providing for decedent's maintenance for life in said home). No one disputes that Grace received Homer's property through his will. The only question is whether the requirements of that will render Grace's interest sufficiently limited to treat the gift to the beneficiaries as complete.[5] *Nielsen v. Duyvejonck*, 94 Ill.App.2d 224, 231, 236 N.E.2d 743 (3d Dist. 1968), concerned a life tenant with an unlimited right to dispose and consume of the corpus for his "comfort and support," at his own discretion. This power to dispose of the property however the survivor desires, with the only duty to the remaindermen being to convey whatever is left as the joint and mutual will directs, is a critical distinction rendering *Neilsen* more similar to *Rock Island Bank & Trust Co. v. Rhoads, supra*, than to the instant situation. See also *Nettz v. Phillips*, 202 F.Supp. 270, 272 (S.D.Ia. 1962) (will gave spouse right to dispose of property without any limitations); *Newman v. United States*, 176 F. Supp. 364, 366 (S.D.Ill.1959) (same). The treatises plaintiff cites similarly concern the situation where the survivor takes the property without limitations on its use or disposal, being obligated only to devise whatever happens to re-

[5]Both of these cases also seem to hold that the retention of an income interest would preclude gift tax. *In re Estate of Murphy*, 38 Ill.2d at 79, 230 N.E.2d 266; *In re Estate of Alter*, 49 Ill.2d at 389, 275 N.E.2d 364. The cases the Supreme Court of Illinois cites in support, however, address only the issue of the donor's control—if the donor has retained no power to alter the terms of the gift or to revoke it in any way, then the transfer is taxable as a gift, otherwise it is not. See *People v. Schallerer*, 12 Ill.2d 240, 245, 145 N.E.2d 585 (1957); *People v. McCormick*, 327 Ill. 547, 158 N.E. 861 (1927). Grace's lack of control to alter the terms of the bequests under the couple's joint and mutual will renders the gift complete under Illinois law. Consequently *Estate of Sanford v. Commissioner*, 308 U.S. 39, 43, 60 S.Ct. 51, 55, 84 L.Ed. 20, which concerns a gift that is incomplete because the donor retained the power to modify its terms or ultimate beneficiaries, provides plaintiff no support because Grace lacks such power.

main at death to certain designated beneficiaries. Br. at 5-6.

Nor does *Hambleton v. Commissioner*, 60 T.C. 558 (1973), support plaintiff's position. Quite the contrary is true. Although a joint and mutual will was at issue in *Hambleton*, the court held that that will did not purport to restrict the surviving spouse's disposition of her property. Rather it obligated her only to convey whatever remained at her death to the beneficiaries named in the joint will. Because the amount of property that eventually would be given to the third parties was indefinite, no gift tax could be imposed. The Tax Court specifically distinguished the situation where the joint and mutual will purports to dispose of the entire estate at the death of the first of the couple to die. In this situation "it appears to be settled that the surviving spouse makes a taxable gift of the remainder interest at the death of the testator first to die, at least to the extent that the value of the remainder exceeds the value of the life estate obtained in the decedent's share of the * * * property." *Id.* at 567. This latter case is precisely the situation that Homer's and Grace's will set up. Because the will purports to dispose of all of the couple's property and obligates Grace to convey the entire estate in a detailed, specified manner—rather than being free to dissipate the property and transfer only whatever may remain at her death—she is deemed to have made a taxable gift of the remainder interest at the time of Homer's death. In the last analysis, *Hambleton* strongly supports the government's position.

While our research has disclosed several cases considering the rights of beneficiaries under a joint and mutual will when the surviving spouse attempts to transfer the willed property to others, none of these cases considers the

problem of taxation. See, *e.g., First United Presbyterian Church v. Christenson, supra; Tontz v. Heath, supra; Freese v. Freese, supra.* The most relevant is *First United Presbyterian Church v. Christenson,* in which the Supreme Court of Illinois stated it did not accept the beneficiary plaintiff's argument that it held a vested remainder subject to the widow's life estate. 64 Ill.2d at 496-497, 1 Ill.Dec. 344, 356 N.E.2d 532. This statement is troubling, until placed in the context of what the court actually held. The plaintiff had argued that it held a fee simple interest and evidently believed that the widow could not transfer even her life estate interest. The court rejected this broad argument, holding that the wife could indeed convey her life estate interest, although any transfer she made would be subject to the church's remainder interest. *Id.* at 499-500, 1 Ill.Dec. 344, 356 N.E.2d 532. Our decision today does not conflict with this holding. Grace certainly may convey her right to income to third parties. She may also transfer any of the property that is not specifically devised for investments of equal or greater value. What she may not do is dispose of the corpus for any reason other than to meet her requirements for her health, support, comfort and maintenance, which power is ascertainable under Illinois law. Consequently her ability to alienate this property is restricted.

In summary, in order to determine what sort of interest Grace received, the will itself and any relevant state law are controlling. Our survey of Illinois cases convinces us that Grace received a life estate limited by an ascertainable standard, rendering the remainder interests in the will's beneficiaries subject to federal gift tax. The judgment of the district court refunding $315,298.00 in federal gift tax (plus interest and costs) to taxpayer Grace Pyle is reversed, costs to the United States.

# APPENDIX B

---

Grace S. PYLE, a disabled adult, by Carolyn STRAUB, Successor Guardian of her Estate, Plaintiff,

v.

UNITED STATES of America,

Defendant.

No. 82-3235.

United States District Court,
C.D. Illinois,
Springfield Division.

Jan. 30. 1984.

Guardian of disabled adult brought action seeking a return of gift taxes. The District Court, J. Waldo Ackerman, Chief Judge, held that guardian was entitled to return of gift taxes paid on remainder interest created by joint and mutual will, since power of disabled adult to invade corpus for her health, comfort, support and maintenance rendered gift of remainder incomplete.

Order accordingly.

1. Internal Revenue

A retained power renders a gift incomplete for gift tax purposes when it is not limited or ascertainable.

2. Internal Revenue

Guardian of disabled adult was entitled to return of gift taxes paid pursuant to gift of remainder interest to donees named as beneficiaries in joint and mutual will,

since power of disabled adult to invade the corpus for her health, comfort, support and maintenance rendered gift incomplete.

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R.E. Dehen, Melvin Routman, Robert Magill, Springfield, Ill., for plaintiff.

Gerald D. Fines, U.S. Atty., Richard N. Cox, Asst. U.S. Atty., Springfield, Ill., Steven Toscher, Stephen T. Lyons, Tax Div., U.S. Dept. of Justice, Washington, D.C., for defendant.

ORDER

J. WALDO ACKERMAN, Chief Judge.

This case concerns Plaintiff's complaint seeking a return of gift taxes. Plaintiff is a guardian of Grace Pyle, a disabled adult. Grace and Homer Pyle executed a joint and mutual will on November 29, 1973. The will contained, among other things, these clauses:

> Third: I, Homer V. Pyle, hereby will, give, devise and bequeath, all of my property, both personal and real or mixed, and wheresoever situated, to my wife, Grace S. Pyle, in fee simple.
>
> Fourth: I, Grace S. Pyle, hereby will, give, devise and bequeath unto my husband, Homer V. Pyle, all of my property, both personal, real or mixed, and wheresoever situated to be his in fee simple.

The will also provided for a detailed disposition of the property on the death of the surviving spouse.

Homer Pyle died on March 27, 1978. On December 27, 1978, Grace Pyle's attorney filed a gift tax return, and

eventually paid taxes and interest of $315,298.00 to the Internal Revenue Service. Plaintiff later claimed the gift tax computation was incorrect.

On January 10, 1981, the Illinois Circuit Court of the Seventh Judicial Circuit construed the will as a joint and mutual will. The Circuit Court held that the will established a contractual obligation that restricted Grace Pyle from alienating, transferring, conveying or disposing of any of her property. Plaintiff could utilize the income or any corpus for her health, support, comfort and maintenance requirements. Accordingly, Grace Pyle appears to have retained a life estate and the power to invade the corpus for her health, support, comfort and maintenance. The Circuit Court later noted that Plaintiff had the right to use all the assets, if necessary, for her maintenance, support, comfort or health. The Government argues that Grace Pyle made a gift of property when the joint will became irrevocable at the time of Homer Pyle's death. It contends Grace Pyle had only a life estate in her property at that time, and that a gift of the remainder interest was made to the donee's named as beneficiaries in the will. Both parties have filed motions for judgment on the pleadings or in the alternative summary judgment.

[1] The focal point of this case is Grace Pyle's power to invade the corpus for her health, support, comfort and maintenance. If this power renders the gift of the remainder incomplete, the gift tax was inappropriate. A retained power renders a gift incomplete when it is not limited or ascertainable. 26 C.F.R. 25.2511(g)(2).

[2] It is without question that state law controls Grace Pyle's ability to invade the corpus Neither party has cited Illinois cases concerning the meaning of health, support,

comfort and maintenance, and there appears to be a paucity of Illinois law in this area. From a purely grammatical standpoint, it can be presumed that the addition of the word comfort expands the life tenant's ability to invade the corpus. The extent of this expansion, however, is subject to varying interpretations. This Court located several Illinois cases interpreting the word comfort as it relates to a life tenant's ability to invade corpus. *See, e.g., Rock Island Bank and Trust Co. v. Rhoads,* 353 Ill. 131, 187 N.E. 139 (1933). In *Rhoads,* a testator had made the following disposition of a portion of his property:

> All the rest, residue and remainder of my estate, both real, personal and mixed and wheresoever situate, I give, devise and bequeath unto well-beloved wife, Mary E. Robinson to have and to hold the same unto her for and during her natural life, with full authority to use and dispose of so much of the same as may in her judgment be necessary for her *comfort and satisfaction* in life.

*Id.* at 132, 187 N.E. 139 (emphasis supplied). The court held that Robinson had an unlimited discretion to invade the corpus. While the language in *Rhoads* is slightly different than that employed in this case, the difference should not effect the substantive rights of the life tenant. Grace Pyle had the right to invade corpus for her health, support, maintenance and comfort. Only Grace Pyle could determine what was necessary for her comfort. There is no indication in any of the documents filed in this Court that Grace Pyle had to exhaust specific assets before she could invade the corpus for her comfort and support. *Nielsen v.*

*Duyvejonck*, 94 Ill.App.2d 224, 236 N.E.2d 743 (3d Dist. 1968). As long as Grace Pyle determined the assets were necessary for her comfort she could use them. Obviously this use could consume the corpus in its entirety.

Federal courts, of various jurisdictions, have held against the government under substantially similar circumstances. Comfort embraces a variety of activities, properties and expenditures. It is not limited to the bare essentials of life, but includes purchases that bring ease, contentment and enjoyment. *Doyle v. United States*, 358 F.Supp. 300, 309 (E.D.Pa.1973). Where comfort is used as a standard for the invasion of corpus, it is not construed merely as the ability to invade the corpus for maintenance and support. Under these circumstances, invasion is allowed for the beneficiary's "contentment or enjoy." *Id.* at 309-10. *See also, Lehman v. United States*, 448 F.2d 1318 (5th Cir. 1971).

The facts of this case are similar to *Hambleton v. Commissioner*, 60 T.C. 558 (1973). In *Hambleton*, Charles and Sallie Hambleton had executed a joint and mutual will disposing of both parties' property. The survivor agreed to bequeath all of their property to a trustee, who was to pay the survivor the income and such principal as necessary to maintain and support the survivor. The tax court held that the transfer was not a taxable gift, but was only a transfer of her bare legal title which did not result in the relinquishment of any rights to the property. The tax court further noted that a will speaks only at the time of the testator's death. Thus, Sallie Hambleton's property would pass under the joint will when it was probated as her testament. *Id.* at 563.

Accordingly, the Court finds for Plaintiff and against the United States. The United States is ordered to refund $315,298, plus interest, to Plaintiff.

# APPENDIX C

---

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT

SANGAMON COUNTY, ILLINOIS

IN PROBATE

---

In the Matter of the Estate of HOMER V. PYLE, Deceased.

THE ILLINOIS NATIONAL BANK OF SPRINGFIELD, Guardian of the Estate of Grace S. Pyle, a disabled adult; CAROLYN STRAUB, individually and as Guardian of the person of Grace S. Pyle, a disabled adult; and MARIAN SCHULTZ CHEATHAM, individually, by her duly authorized agent, Carolyn Straub,

Petitioners,

v.

JOHN K. KOVSKI; ROY KOVSKI; THELMA SCHULTZ; CHARLES E. KRELL and spouse, HELEN; LEONARD HIMSTADT and spouse, MARY; ROBERT GOLIGHTLY and DOROTHY GOLIGHTLY; VERNON LOVEKAMP and MAXINE LOVEKAMP; HARRY PULLIAM and spouse, HELEN; VIRGINIA MURPHY; MARIAN ANDERSON; Unknown Personal Representatives, Legatees and Heirs of ALFRED PULLIAM and spouse, MILDRED; MEMORIAL MEDICAL CENTER, a/k/a MEMORIAL HOSPITAL of Springfield, Il.; THE Y.M.C.A. of Springfield, Il.; THE Y.W.C.A. of Springfield, Il.; THE FIRST METHODIST CHURCH of Springfield, Il.; SHRINERS'

CRIPPLED CHILDREN'S HOSPITAL, a Colorado Corporation doing business in Illinois; THE FEDERAL LAND BANK OF ST. LOUIS, a Corporation doing business in Illinois; and other Unknown Owners, Heirs and Personal Representatives,

Respondents.

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NO. 78-P-295

JUDGMENT

Now comes on for hearing the Cross-Motions For Summary Judgment filed by MEMORIAL MEDICAL CENTER, formerly known as MEMORIAL HOSPITAL, an Illinois not-for-profit Corporation, and SHRINERS' HOSPITALS FOR CRIPPLED CHILDREN, a Colorado Corporation doing business in Illinois, by their attorneys, Brown, Hay & Stephens, in the Response to Count IV of the Petition filed by the Petitioners herein and the Motion For Summary Judgment filed by THE ILLINOIS NATIONAL BANK OF SPRINGFIELD, Guardian of the Estate of Grace S. Pyle, a disabled adult; CAROLYN STRAUB, individually and as beneficiary under the double Wills of Homer V. Pyle, deceased, and Grace S. Pyle, and as Guardian of the person of Grace S. Pyle, a disabled adult; and MARIAN SCHULTZ CHEATHAM, individually and as beneficiary under the double Wills of Homer V. Pyle, deceased, and Grace S Pyle, by their attorneys, Robert E. Dehen and Melvin R. Routman; rulings were made on the record concerning Para. 3, Page 18 of the prayer in a Petition filed by the INB. et al., April 29, 1980; Motion concerning Count IV filed July 11, 1980 by MEMORIAL

MEDICAL CENTER, et al. In addition, the court denies a Motion contained in Count IV of Motions filed June 9, 1980 by JOHN K. KOVSKI, Executor, and a Motion to Strike was denied, which Motion was filed February 17, 1981 by YMCA, et al.; and this Court having examined said Motions and the various memoranda filed in support thereof finds:

1. This Court has jurisdiction over all interested parties with the following individuals appearing in person by their attorneys: JOHN K. KOVSKI and ROY KOVSKI by Londrigan and Potter: MEMORIAL MEDICAL CENTER and SHRINER'S HOSPITALS FOR CRIPPLED CHILDREN by Brown, Hay & Stephens; THE Y.W.C.A. by Barber, Hall, Segatto & Hoffee; THE Y.M.C.A. and THE FIRST METHODIST CHURCH by Lott & Surman, P.C.; THE ILLINOIS NATIONAL BANK OF SPRINGFIELD, as Guardian of the Estate of Grace S. Pyle, a disabled adult, MARIAN SCHULTZ CHEATHAM, and CAROLYN STRAUB by Robert E. Dehen and Routman & Lawley; Guardian ad litem for Unborns and Minors, Patrick J. Sheehan.

2. This Court has jurisdiction over the subject matter which is a valid question arising as to the meaning of the terms and provisions of the instrument dated November 29, 1973 designated as Last Will and Testament and signed by Homer V. Pyle and Grace S. Pyle.

3. Homer V. Pyle and Grace S. Pyle executed an instrument designated Last Will and Testament on November 29, 1973.

4. The instrument executed in November 1973 reads in part as follows:

We, HOMER V. PYLE and GRACE S. PYLE, husband and wife, both of Sangamon County, Illinois, being of sound disposing mind and memory, hereby make, publish and declare this to be our Last Will and Testament, hereby revoking all former wills and codicils heretofore made by either of us. This Joint Will is made in pursuance of a contract-agreement between us for the purpose of disposing of all our property whether owned by us as joint tenants, as tenants in common or in severalty in the matter of this our Last Will and Testament...

THIRD. I, HOMER V. PYLE, hereby will, give, devise and bequeath all of my property, both personal and real or mixed, and wheresoever situated, to my wife, GRACE S. PYLE, in fee simple.

FOURTH. I, GRACE S. PYLE, hereby will, give, devise and bequeath unto my husband, HOMER V. PYLE, all of my property, both personal, real or mixed, and wheresoever situated, to be his in fee simple.

FIFTH. It is our will that after the decease of the survivor of us that we and each of us nominate and appoint THE ILLINOIS NATIONAL BANK OF SPRINGFIELD, ILLINOIS, to be the Executor of the estate of the survivor of us to carry through the final administration of our estate and to make the payments of the bequests as listed in paragraphs SIXTH and SEVENTH of this our will.

It is further our will and request that our Executor...

SIXTH. After the decease of both of us or the survivor of us we will, give and bequeath unto the follow-

ing persons the amount or sum set opposite their names...:

SEVENTH. After the payments of the various sums designated above, we and each of us will that the survivor of us dispose of the remainder of our estate to the following named parties, corporations, institutions and individuals as follows:

1. Memorial Hospital of Springfield, Illinois, 1/15 of residue.

2. The First Methodist Church of Springfield, 1/15 of residue.

3. The Y.M.C.A. of Springfield, Illinois, 1/15 of residue.

4. The Y.W.C.A. of Springfield, Illinois, 1/15 of residue.

5. Shriners Crippled Childrens Hospital, a Colorado corporation, 1/15 of residue.

6. To Carolyn Straub 1/3 of residue.

7. To Marian Schultz Cheatham 1/3 of residue.

EIGHTH. We and each of us direct THE ILLINOIS NATIONAL BANK OF SPRINGFIELD as our Executor to sell all of our property, both personal and real, at public sale or at private sale as they determine is best, and divide the proceeds as listed above.

5. Judicial notice is taken of the prior proceeding in this cause upon the presentation of the instrument for administration of the Will of Homer Pyle.

6. The question raised by the Cross Motions For Summary Judgment is whether the instrument designated as Last Will and Testament and executed by Homer V. Pyle and Grace S. Pyle on November 29, 1973 constitutes a Joint and Mutual Will or two separate Wills standing apart but executed on the same instrument.

7. Items FIRST, SECOND, THIRD and FOURTH of the instrument establish a separate Will for each of the testators. Each grants the other all property "in fee simple".

8. The preamble to the Will recites that this instrument is a "Joint Will...made in pursuance of a contract-agreement between us for the purpose of disposing of all our property whether owned by us as joint tenants, as tenants in common or in severalty." Item FIFTH of the instrument states that it is "our will that after the decease of the survivor of us that we and each of us". Item FIFTH also refers to the "final administration of our estate". Items SIXTH and SEVENTH do not take effect until after the decease of the survivor of the two testators, but the language utilized is "we will give and bequeath". Item EIGHTH is a direction for sale of all property upon death of the survivor.

9. Item SEVENTH also provides after the fractional distribution of the residue that certain real estate be retained and distributed in satisfaction of the bequests to CAROLYN STRAUB and MARIAN SCHULTZ CHEATHAM.

10. The instrument designated as the Last Will and Testament of Homer V. Pyle and Grace S. Pyle clearly shows on its face the contractual nature of the mutual promises of the husband and wife as joint testators and

constitutes the contract itself. Each made a reciprocal or identical disposition of all property owned by each to the other "in fee simple" and thereafter disposition upon the death of the survivor in accordance with a common plan.

11. The intention of the testators from the four corners of the Will was to provide for the needs of the surviving spouse, whomever it might have been, for his or her lifetime, but upon the death of the survivor, a specified plan of disposition was established. This plan executed in the instrument in question establishes a contractual obligation restricting Grace S. Pyle from alienating all of the property and disposing of the same without restriction except insofar as it is necessary to utilize any or all of the assets for her health, support, comfort or maintenance.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Last Will and Testament executed by Homer V. Pyle and Grace S. Pyle on November 29, 1973 constitutes a Joint and Mutual Will. Grace S. Pyle has fee simple title to any and all property standing in the sole name of Homer V. Pyle at the time of his death subject to the contract contained in the Joint and Mutual Will. Said contract restricts Grace S. Pyle from alienating, transferring, conveying or disposing of any and all of her property howsoever acquired with the exception that she or her legal representatives may utilize the income and any corpus necessary for her health, support, comfort and maintenance requirements. Grace S. Pyle and her legal representatives are further authorized to transfer, sell or dispose of any or all of said assets in exchange for investments of equal or more value, with the sole exception that those parcels of real estate specifically devised to CAROLYN

STRAUB and MARIAN SCHULTZ CHEATHAM shall be retained unless such property or any portion thereof is needed for her health, support, comfort and maintenance.

IT IS FURTHER ADJUDGED that the findings in the record are hereby adopted as part of this Judgment.

IT IS FURTHER ADJUDGED that the other issues raised in the pleadings filed in this cause by all parties are reserved for further hearing and determination by this Court, but this Court specifically finds that there is no just cause or reason to delay the enforcement of or appeal from this Judgment.

Enter: June 10, 1981.

/s/ Harry Bevin
Judge

# APPENDIX D

§ 2501

## TITLE 26—INTERNAL REVENUE CODE

### § 2501. Imposition of tax

(a) Taxable transfers

(1) General rule

A tax, computed as provided in section 2502, is hereby imposed for each calendar year on the transfer of property by gift during such calendar year by any individual resident or nonresident.

(2) Transfers of intangible property

Except as provided in paragraph (3), paragraph (1) shall not apply to the transfer of intangible property by a nonresident not a citizen of the United States.

(3) Exceptions

Paragraph (2) shall not apply in the case of a donor who at any time after March 8, 1965, and within the 10-year period ending with the date of transfer lost United States citizenship unless—

(A) such donor's loss of United States citizenship resulted from the application of section 301(b), 350, or 355 of the Immigration and Nationality Act, as amended (8 U.S.C. 1401(b), 1482, or 1487), or

(B) such loss did not have for one of its principal purposes the avoidance of taxes under this subtitle or subtitle A.

(4) Burden of proof

If the Secretary establishes that it is reasonable to believe that an individual's loss of United States citizenship would, but for paragraph (3), result in a substantial reduction for the calendar year in the taxes on the transfer of property by gift, the burden of proving that such loss of citizenship did not have for one of its principal purposes the avoidance of taxes under this subtitle or subtitle A shall be on such individual.

(5) Transfers to political organizations

Paragraph (1) shall not apply to the transfer of money or other property to a political organization (within the meaning of section 527(e)(1)) for the use of such organization.

(b) Certain residents of possessions considered citizens of the United States

A donor who is a citizen of the United States and a resident of a possession thereof shall, for purposes of the tax imposed by this chapter, be considered a "citizen" of the United States within the meaning of that term wherever used in this title unless he acquired his United States citizenship solely by reason of (1) his being a citizen of such possession of the United States, or (2) his birth or residence within such possession of the United States.

(c) Certain residents of possessions considered nonresidents not citizens of the United States

A donor who is a citizen of the United States and a resident of a possession thereof shall, for purposes of the

tax imposed by this chapter, be considered a "nonresident not a citizen of the United States" within the meaning of that term wherever used in this title, but only if such donor acquired his United States citizenship solely by reason of (1) his being a citizen of such possession of the United States, or (2) his birth or residence within such possession of the United States.

(d) Cross references

(1) For increase in basis of property acquired by gift for gift tax paid, see section 1015(d).

(2) For exclusion of transfers of property outside the United States by a nonresident who is not a citizen of the United States, see section 2511(a).

* * *

§ 2511. Transfers in general

(a) Scope

Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

(b) Intangible property

For purposes of this chapter, in the case of a nonresident not a citizen of the United States who is excepted from the application of section 2501(a)(2)—

(1) shares of stock issued by a domestic corporation, and

(2) debt obligations of—

(A) a United States person, or

(B) the United States, a State or any political subdivision thereof, or the District of Columbia,

which are owned and held by such nonresident shall be deemed to be property situated within the United States.

* * *

§ 2512. Valuation of gifts

(a) If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

(b) Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

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# APPENDIX E

Internal Revenue Service, Treasury

§ 25.2511-1

## TRANSFERS

§ 25.2511-1 Transfers in general.

(a) The gift tax applies to a transfer by way of gift whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. For example, a taxable transfer may be effected by the creation of a trust, the forgiving of a debt, the assignment of a judgment, the assignment of the benefits of an insurance policy, or the transfer of cash, certificates of deposit, or Federal, State or municipal bonds. Statutory provisions which exempt bonds, notes, bills and certificates of indebtedness of the Federal Government or its agencies and the interest thereon from taxation are not applicable to the gift tax, since the gift tax is an excise tax on the transfer, and is not a tax on the subject of the gift.

(b) In the case of a gift by a nonresident not a citizen of the United States—

(1) If the gift was made on or after January 1, 1967, by a donor who was not an expatriate to whom section 2501 (a) (2) was inapplicable on the date of the gift by reason of section 2501(a) (3) and paragraph (a)(3) of § 25.2501-1, or

(2) If the gift was made before January 1, 1967, by a donor who was not engaged in business in the United States during the calendar year in which the gift was made,

the gift tax applies only if the gift consisted of real property or tangible personal property situated within the United States at the time of the transfer. See §§ 25.2501-1 and 25.2511-3.

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512- 8.Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the con-

trary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. In illustration, if Blackacre was devised to A under the decedent's will (which also provided that all lapsed legacies and devises shall go to B, the residuary beneficiary), and under the local law A could refuse to accept ownership in which case title would be considered as never having passed to A, A's refusal to accept Blackacre within a reasonable time of learning of the devise will not constitute the making of a gift by A to B. However, if a decedent who owned Greenacre died intestate with C and D as his only heirs, and under local law the heir of an intestate cannot, by refusal to accept, prevent himself from becoming an owner of intestate property, any gratuitous disposition by C (by whatever term it is known) whereby he gives up his ownership of a portion of Greenacre and D acquires the whole thereof constitutes the making of a gift by C to D.

(d) If a joint income tax return is filed by a husband and wife for a taxable year, the payment by one spouse of all or part of the income tax liability for such year is not treated as resulting in a transfer that is subject to gift tax. The same rule is applicable to the payment of gift tax for a "calendar period" (as defined in § 25.2502-1 (c) (1) ) in the case of a husband and wife who have consented to have the gifts made considered as made half by each of them in accordance with the provisions of section 2513.

(e) If a donor transfers by gift less than his entire interest in property, the gift tax is applicable to the interest transferred. The tax is applicable, for example, to the

transfer of an undivided half interest in property, or to the transfer of a life estate when the grantor retains the remainder interest, or vice versa. However, if the donor's retained interest is not susceptible of measurement on the basis of generally accepted valuation principles, the gift tax is applicable to the entire value of the property subject to the gift. Thus if a donor, aged 65 years, transfers a life estate in property to A, aged 25 years, with remainder to A's issue, or in default of issue, with reversion to the donor, the gift tax will normally be applicable to the entire value of the property.

(f) If a donor is the owner of only a limited interest in property, and transfers his entire interest, the interest is in every case to be valued by the rules set forth in §§ 25.2512-1 through 25.2512-7. If the interest is a remainder or reversion or other future interest, it is to be valued on the basis of actuarial principles set forth in § 25.2512-5, or if it is not susceptible of valuation in that manner, in accordance with the principles set forth in § 25.2512-1.

(g)(1) Donative intent on the part of the transferor is not an essential element in the application of the gift tax to the transfer. The application of the tax is based on the objective facts of the transfer and the circumstances under which it is made, rather than on the subjective motives of the donor. However, there are certain types of transfers to which the tax is not applicable. It is applicable only to a transfer of a beneficial interest in property. It is not applicable to a transfer of bare legal title to a trustee. A transfer by a trustee of trust property in which he has no beneficial interest does not constitute a gift by the trustee (but such a transfer may constitute a gift by the creator of

the trust, if until the transfer he had the power to change the beneficiaries by amending or revoking the trust). The gift tax is not applicable to a transfer for a full and adequate consideration in money or money's worth, or to ordinary business transactions, described in § 25.2512-8.

(2) If a trustee has a beneficial interest in trust property, a transfer of the property by the trustee is not a taxable transfer if it is made pursuant to a fiduciary power the exercise or nonexercise of which is limited by a reasonably fixed or ascertainable standard which is set forth in the trust instrument. A clearly measurable standard under which the holder of a power is legally accountable is such a standard for this purpose. For instance, a power to distribute corpus for the education, support, maintenance, or health of the beneficiary; for his reasonable support and comfort; to enable him to maintain his accustomed standard of living; or to meet an emergency, would be such a standard. However, a power to distribute corpus for the pleasure, desire, or happiness of a beneficiary is not such a standard. The entire context of a provision of a trust instrument granting a power must be considered in determining whether the power is limited by a reasonably definite standard. For example, if a trust instrument provides that the determination of the trustee shall be conclusive with respect to the exercise or nonexercise of a power, the power is not limited by a reasonably definite standard. However, the fact that the governing instrument is phrased in discretionary terms is not in itself an indication that no such standard exists.

(h) The following are examples of transactions resulting in taxable gifts and in each case it is assumed that the

transfers were not made for an adequate and full consideration in money or money's worth:

(1) A transfer of property by a corporation to B is a gift to B from the stockholders of the corporation. If B himself is a stockholder, the transfer is a gift to him from the other stockholders but only to the extent it exceeds B's own interest in such amount as a shareholder. A transfer of property by B to a corporation generally represents gifts by B to the other individual shareholders of the corporation to the extent of their proportionate interests in the corporation. However, there may be an exception to this rule, such as a transfer made by an individual to a charitable, public, political or similar organization which may constitute a gift to the organization as a single entity, depending upon the facts and circumstances in the particular case.

(2) The transfer of property to B if there is imposed upon B the obligation of paying a commensurate annuity to C is a gift to C.

(3) The payment of money or the transfer of property to B in consideration of B's promise to render a service to C is a gift to C, or to both B and C, depending on whether the service to be rendered to C is or is not an adequate and full consideration in money or money's worth for that which is received by B. See section 2512(b) and the regulations thereunder.

(4) If A creates a joint bank account for himself and B (or a similar type of ownership by which A can regain the entire fund without B's consent), there is a gift to B when B draws upon the account for his own benefit, to the

extent of the amount drawn without any obligation to account for a part of the proceeds to A. Similarly, if A purchases a United States savings bond registered as payable to "A or B," there is a gift to B when B surrenders the bond for cash without any obligation to account for a part of the proceeds to A.

(5) If A with his own funds purchases property and has the title conveyed to himself and B as joint owners, with rights of survivorship (other than a joint ownership described in example (4) but which rights may be defeated by either party severing his interest, there is a gift to B in the amount of half the value of the property. However, see § 25.2515-1 relative to the creation of a joint tenancy (or tenancy by the entirety) between husband and wife in real property with rights of survivorship which, unless the donor elects otherwise is not considered as a transfer includible for Federal gift tax purposes at the time of the creation of the joint tenancy. See § 25.2515-2 with respect to determining the extent to which the creation of a tenancy by the entirety constitutes a taxable gift if the donor elects to have the creation of the tenancy so treated. See also § 25.2523(d)-1 with respect to the marital deduction allowed in the case of the creation of a joint tenancy or a tenancy by the entirety.

(6) If A is possessed of a vested remainder interest in property, subject to being divested only in the event he should fail to survive one or more individuals or the happening of some other event, an irrevocable assignment of all or any part of his interest would result in a transfer includible for Federal gift tax purposes. See especially paragraph (e) of § 25.2512-5 or paragraph (e) of § 25.2512-9,

whichever is applicable, for the valuation of an interest of this type.

(7) If A, without retaining a power to revoke the trust or to change the beneficial interests therein, transfers property in trust whereby B is to receive the income for life and at his death the trust is to terminate and the corpus is to be returned to A, provided A survives, but if A predeceases B the corpus is to pass to C, A has made a gift equal to the total value of the property less the value of his retained interest. See paragraph (e) of § 25.2512-5 or paragraph (e) of § 25.2512-9, whichever is applicable, for the valuation of the donor's retained interest.

(8) If the insured purchases a life insurance policy, or pays a premium on a previously issued policy, the proceeds of which are payable to a beneficiary or beneficiaries other than his estate, and with respect to which the insured retains no reversionary interest in himself or his estate and no power to revest the economic benefits in himself or his estate or to change the beneficiaries or their proportionate benefits (or if the insured relinquishes by assignment, by designation of a new beneficiary or otherwise, every such power that was retained in a previously issued policy), the insured has made a gift of the value of the policy, or to the extent of the premium paid, even though the right of the assignee or beneficiary to receive the benefits is conditioned upon his surviving the insured. For the valuation of life insurance policies see § 25.2512-6.

(9) Where property held by a husband and wife as community property is used to purchase insurance upon the husband's life and a third person is revocably designated as beneficiary and under the State law the husband's

death is considered to make absolute the transfer by the wife, there is a gift by the wife at the time of the husband's death of half the amount of the proceeds of such insurance.

(10) If under a pension plan (pursuant to which he has an unqualified right to an annuity) an employee has an option to take either a retirement annuity for himself alone or a smaller annuity for himself with a survivorship annuity payable to his wife, an irrevocable election by the employee to take the reduced annuity in order that an annuity may be paid, after the employee's death, to his wife results in the making of a gift. However, see section 2517 and the regulations thereunder for the exemption from gift tax of amounts attributable to employers' contributions under qualified plans and certain other contracts.

* * *

§ 25.2511-2 Cessation of donor's dominion and control.

(a) The gift tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

(b) As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposi-

tion, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined. For example, if a donor transfers property to another in trust to pay the income to the donor or accumulate it in the discretion of the trustee, and the donor retains a testamentary power to appoint the remainder among his descendants, no portion of the transfer is a completed gift. On the other hand, if the donor had not retained the testamentary power of appointment, but instead provided that the remainder should go to X or his heirs, the entire transfer would be a completed gift. However, if the exercise of the trustee's power in favor of the grantor is limited by a fixed or ascertainable standard (see paragraph (g) (2) of § 25.2511-1). enforceable by or on behalf of the grantor, then the gift is incomplete to the extent of the ascertainable value of any rights thus retained by the grantor.

(c) A gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard. Thus, if an estate for life is transferred but, by an

exercise of a power, the estate may be terminated or cut down by the donor to one of less value, and without restriction upon the extent to which the estate may be so cut down, the transfer constitutes an incomplete gift. If in this example the power was confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete.

(d) A gift is not considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to the donee at the termination of the period, constitutes a completed gift.

(e) A donor is considered as himself having a power if it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. A trustee, as such, is not a person having an adverse interest in the disposition of the trust property or its income.

(f) The relinquishment or termination of a power to change the beneficiaries of transferred property, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event that completes the gift and causes the tax to apply. For example, if A transfers property in trust for the benefit of B and C but reserves the power as trustee to change the

proportionate interests of B and C, and if A thereafter has another person appointed trustee in place of himself, such later relinquishment of the power by A to the new trustee completes the gift of the transferred property, whether or not the new trustee has a substantial adverse interest. The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the initial transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the power, and constitutes a gift of such income or of such other enjoyment taxable as of the "calendar period" (as defined in § 25.2502-1(c)(1) ) of its receipt. If property is transferred in trust to pay the income to A for life with remainder to B, powers to distribute corpus to A, and to withhold income from A for future distribution to B, are powers to change the beneficiaries of the transferred property.

(g) If a donor transfers property to himself as trustee (or to himself and some other person, not possessing a substantial adverse interest, as trustees), and retains no beneficial interest in the trust property and no power over it except fiduciary powers, the exercise or nonexercise of which is limited by a fixed or ascertainable standard, to change the beneficiaries of the transferred property, the donor has made a completed gift and the entire value of the transferred property is subject to the gift tax.

(h) If a donor delivers a properly indorsed stock certificate to the donee or the donee's agent, the gift is completed for gift tax purposes on the date of delivery. If the donor delivers the certificate to his bank or broker as his

agent, or to the issuing corporation or its transfer agent, for transfer into the name of the donee, the gift is completed on the date the stock is transferred on the books of the corporation.

(i) [Reserved]

(j) If the donor contends that a power is of such nature as to render the gift incomplete, and hence not subject to the tax as of the "calendar period" (as defined in § 25.2502-1(c)(1) ) of the initial transfer, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument of transfer, should be submitted.

* * *